# Comos Industry Solution GMBH v Jacob and Toralf Consulting Letrikon Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–2958 OF 2010
SURIYADI, JEFFREY TAN AND ALIZATUL KHAIR JJCA
26 APRIL 2011

*Arbitration — Stay of proceedings — Application — Whether specific application for stay 'step in the proceedings' that took away appellant's right to refer to arbitration — Whether there was binding arbitration agreements between parties — Arbitration Act 2005 s 10*

*Civil Procedure — Stay of proceedings — Application for — Application pending arbitration proceedings — Application to set aside writ and leave to file statement of defence allowed earlier — Whether appellant estopped from referring dispute to arbitration — Whether specific application step in proceedings that took away appellant's right to refer to arbitration*

This was an appeal against the dismissal of the appellant's (the first defendant below) application to stay all proceedings against the appellant pending proceedings pursuant to s 10 of the Arbitration Act 2005 ('Act'). In the case, various suits, appeals and other legal proceedings between the parties were settled by a settlement agreement. The respondents (the plaintiffs below) and appellant agreed to settle all ongoing legal disputes, and to 'return' the 'COMOS PT Software business in Asia' to the appellant. The respondents' claim was premised on alleged fraudulent representations by the second and fifth defendants below on behalf of all defendants that allegedly induced the respondents to enter into the settlement agreement. Accordingly, the respondents filed the claim. The appellant entered a memorandum of conditional appearance and then applied (encl 41) to set aside the writ on the ground that local courts had no jurisdiction to determine the dispute, with an alternative prayer for leave to file a statement of defence. That application was dismissed, but leave was granted to the appellant to file a statement of defence. Thereafter, the appellant filed the instant application to stay the proceedings pending arbitration, which was dismissed. The court below held that the application to set aside the writ and the grant of leave to file a statement of defence were two steps taken in the proceedings that took away the right of the appellant to refer the dispute to arbitration. Hence this appeal by the appellant.

**Held**, allowing the appeal with costs:

(1) An application is not a step in the proceedings, if it does not express the

willingness of the defendant to go along with the determination of the courts instead of arbitration. A defendant who has specifically stated in the application or supporting affidavit that he intends to seek a stay is not estopped from asserting his right to invoke arbitration. An application, which is made in the event that the specific application for a stay is unsuccessful, is not a step in the proceedings (see para 14).

(2) In the affidavit filed in support of encl 41, the appellant openly reserved the right to refer the dispute to arbitration. Indeed, in all papers filed, the appellant unceasingly challenged the jurisdiction of the court below and reserved the right to refer the dispute to arbitration. Given the qualifications under which it was made, the prayer for time to file a statement of defence was only a precautionary step to obviate the risk of a judgment in default of pleadings, should prayer (a) in encl 41 be refused. Here, encl 41 never expressed the willingness of the appellant to go along with the determination by the courts and to abandon arbitration (see para 15).

(3) Enclosure 41 was not a step in the proceedings. The fact that other defendants applied but failed to set aside the writ could not be held against the appellant. There was a valid and binding arbitration agreement between the appellant and respondent, and the fact that the respondents had other defendants, should not impact on the right of the appellant to refer the dispute to arbitration (see para 16).

**[Bahasa Malaysia summary**

Ini adalah rayuan terhadap penolakan permohonan perayu (defendan pertama di mahkamah rendah) untuk penangguhan kesemua prosiding terhadap perayu sehingga prosiding berikutan s 10 Akta Timbang Tara 2005 ('Akta'). Di dalam kes ini, berbagai guaman, rayuan dan lain-lain prosiding undang-undang di antara pihak-pihak diselesaikan secara perjanjian penyelesaian. Responden-responden (plaintif di mahkamah rendah) dan perayu bersetuju menyelesaikan kesemua pertikaian perundangan yang berlangsung, dan untuk mengembalikan 'COMOS PT Software business in Asia' kepada perayu. Tuntutan responden-responden adalah berdasarkan kepada dakwaan salah nyata fraud oleh defendan-defendan kedua dan kelima bagi pihak kesemua defendan-defendan yang didakwa mendorong responden-responden memasuki perjanjian penyelesaian. Dengan itu, responden-responden memfailkan tuntutan tersebut. Perayu memasuki memorandum kehadiran bersyarat dan kemudian memohon (lampiran 41) untuk mengetepikan writ atas alasan bahawa mahkamah tempatan tidak mempunyai bidang kuasa untuk memutuskan pertikaian tersebut, dengan permohonan alternatif untuk kebenaran memfailkan penyataan pembelaan. Permohonan tersebut ditolak, tetapi kebenaran diberikan kepada perayu memfailkan penyataan pembelaan. Kemudian, perayu memfailkan tindakan ini untuk penangguhan prosiding sementara menunggu timbang tara, yang

telah ditolak. Mahkamah di bawah memutuskan bahawa permohonan untuk mengetepikan writ dan pemberian kebenaran untuk memfailkan penyataan pembelaan adalah dua langkah yang diambil dalam prosiding yang menafikan hak perayu untuk merujuk pertikaian tersebut kepada timbang tara. Maka rayuan ini oleh perayu.

**Diputuskan**, membenarkan rayuan dengan kos:

(1) Suatu permohonan bukan merupakan satu langkah dalam prosiding, jika ia tidak menyatakan kesediaan defendan untuk meneruskan dengan pemutusan mahkamah dan bukan timbang tara. Defendan yang telah secara spesifik menyatakan di dalam permohonan atau afidavit sokongan bahawa dia berniat untuk memohon penangguhan tidak diestop daripada menyatakan haknya untuk membangkitkan timbang tara. Suatu permohonan, yang dibuat jika permohonan spesifik untuk penangguhan tidak berjaya, bukan satu langkah di dalam prosiding (lihat perenggan 14).

(2) Di dalam afidavit yang difailkan menyokong lampiran 41, perayu secara terbuka mengekalkan hak untuk merujuk pertikaian tersebut kepada timbang tara. Sememangnya, di dalam kesemua kertas yang difailkan, perayu tidak berhenti mencabar bidang kuasa mahkamah di bawah dan mengekalkan hak untuk merujuk pertikaian kepada timbang tara. Berdasarkan kepada syarat di bawah mana ia dibuat, permohonan untuk masa untuk memfailkan pernyataan pembelaan hanyalah langkah berjaga-jaga untuk menghindarkan risiko penghakiman ingkar pliding, jika permohonan (a) di dalam lampiran 41 ditolak. Di sini, lampiran 41 tidak pernah menunjukkan kesediaan perayu untuk bersetuju dengan pemutusan mahkamah dan untuk mengabaikan timbang tara (lihat perenggan 15).

(3) Lampiran 41 bukan satu langkah dalam prosiding. Fakta bahawa defendan-defendan lain memohon tetapi gagal untuk mengetepikan writ tidak digunakan terhadap perayu. Terdapat perjanjian timbang tara yang sah dan mengikat di antara perayu dan responden, dan fakta bahawa responden-responden adalah termasuk lain-lain defendan, ia tidak boleh memberikan impak kepada hak perayu untuk merujuk pertikaian tersebut kepada timbang tara (lihat perenggan 16).]

**Notes:**

For cases on application, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1752–1798.

For cases on application for stay of proceedings, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7260–7294.

**Cases referred to**

*Capital Trust Investments Ltd v Radio Design TJ AB and others* [2002] EWCA Civ 135, CA (refd)

*Cheah Wai Poh v Chin Brothers & Co Ltd* [1958] MLJ 215 (refd)

*Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474, SC (refd)

*Patel v Patel* [1999] 3 WLR 322, CA (refd)

*Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor* [2002] 2 MLJ 625, FC (refd)

*Thamesa Designs Sdn Bhd & Ors v Kuching Hotels Sdn Bhd* [1993] 3 MLJ 25, SC (refd)

**Legislation referred to**

Arbitration Act 2005 s 10, 10(1)

Arbitration Act 1996 [UK] s 9, 9(3), (4)

*Chew Kherk Ying (Emran Arifin with him) (Wong & Partners) for the appellant.*
*Stanley Isaacs (C Sivasankar with him) (Isaacs, Tan & Chu) for the respondents.*

**Jeffrey Tan JCA (delivering judgment of the court):**

**[1]** This is an appeal against the order below dated 13 October 2010, dismissing the application (encl 91) of the appellant (the first defendant below) to stay all proceedings against the appellant pending proceedings pursuant to s 10 of the Arbitration Act 2005 ('AA 2005').

**[2]** As far as we could gather, the pertinent background facts were as follows. Various suits, appeals and other legal proceedings between the parties were settled by a settlement agreement dated 31 July 2008 (see 221–241 of the appeal record), wherein the respondents (the plaintiffs below) and appellant agreed to settle all ongoing legal disputes, and to the 'return' of the 'COMOS PT Software business in Asia' to the appellant. The respondents' claim below was premised on alleged fraudulent representations by the second and fifth defendants below on behalf of all the defendants that allegedly induced the respondents to enter into the settlement agreement. On 30 March 2009, the respondents filed the claim below. On 13 October 2009, the appellant entered a memorandum of conditional appearance and then applied (encl 41) to set aside the writ on the ground that local courts had no jurisdiction to determine the dispute, with an alternative prayer for leave to file a statement of defence 'in the event that this Honourable Court dismisses the application herein subject to the (appellant) having the liberty to apply to this Honourable Court for such orders as it considers appropriate and or necessary'. That application (encl 41) was dismissed, but leave was granted to the appellant to file a statement of

defence. Thereafter, the appellant filed the instant application (encl 91) to stay the proceedings pending arbitration, which, as said, was dismissed on 13 October 2010.

**[3]** The settlement agreement incorporated the following provision:

> This agreement shall be governed by and construed in accordance with Malaysian law. All disputes at all material times arising out of or in connection with the present agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (ICC) by three arbitrators appointed in accordance with the said Rules. Language of the said proceedings shall be in English. The seat of arbitration shall be in Singapore.

**[4]** That aforesaid arbitration agreement was not disputed or denied by the respondents. That notwithstanding, the respondents contended in the court below that the appellant, by applying for time to file a statement of defence, had taken a step in the proceedings and waived its right to refer the dispute to arbitration. Agreeing with the respondents, the court below held that the application to set aside the writ and the grant of leave to file a statement of defence were two steps taken in the proceedings that took away the right of the appellant to refer the dispute to arbitration (see pp 5–6 of the *rekod rayuan tambahan*).

**[5]** Section 10(1) of the AA 2005 provides that 'A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed'. An application for stay pending arbitration is not a step in the proceedings. That does not however answer the issue, which is whether encl 41 was a step or steps in the proceedings as held by the court below.

**[6]** Not much has been said by the courts on the meaning of 'steps in the proceedings', since the AA 2005 only came into force on 15 March 2006. But that is not to say that judicial enunciation is for that reason absent, as 'steps in the proceedings' as currently provided remain the same as the 'steps in the proceedings' in s 6 of the Arbitration Act 1952 (Revised 1972) (repealed by the AA 2005). All precedents remain good law, quite without distinction as to whether they are pre or post AA 2005.

**[7]** We have related the grounds upon which the respondents resisted arbitration and upon which the court below dismissed the application for stay. Now let us convey the other side of the story, which as submitted by learned

counsel for the appellant was that there was an express reservation to refer the dispute to arbitration and that there was no submission to the jurisdiction of the court below. Learned counsel for the respondents countered that encl 41 asserted that jurisdiction was with German courts but was silent on arbitration, that the order to file a statement of defence had 'crystallised', and that the appellant filed encl 91 after they had not succeeded in encl 41.

**[8]** But this is what we find, which is really there for all to see, in encl 41 and the affidavits filed thereto. There were two principal prayers in encl 41, namely (a) for an order 'the writ of summons and or the Notice of the writ of summons issued against the 1st defendant herein be set aside' and (b) for an order 'that the 1st Defendant be permitted 21 days from the date of an order herein to file the defence in the event this Honourable Court dismisses the application herein subject to the 1st Defendant having the liberty to apply to this Honourable Court for such orders as it considers appropriate and or necessary'. Those prayers were indeed silent on arbitration. However, in the affidavit filed in support of encl 41, it was clearly affirmed by one Heiko Lange who was the head of the legal department of the appellant that he 'reserves the [Appellant's] right to seek a stay of the action herein in deference to arbitration subject to the outcome of the application' (see 133 of the appeal record). Put simply, Heiko Lange said that the appellant reserved the right to refer the dispute to arbitration, if the appellant were unsuccessful in encl 41. Clearly therefore, in making the application to set aside the writ on the ground that local courts had no jurisdiction, the appellant reserved the right to refer the dispute to arbitration. However, it was held by the court below that the reservation to arbitration was 'not an application but mere averment that had no bearing on the fact that the [Appellant] did take a step in the proceedings' (see 8RRT). Unfortunately, by that latter finding, it was shown out that it was not appreciated that the appellant had nonetheless reserved the right to refer the dispute to arbitration, notwithstanding that that reservation was expressed in para 4 of the affidavit in support (see 133AR) and not in encl 41. It was not appreciated that there was nonetheless a clear reservation to refer the dispute to arbitration, regardless of the shape and form in which it was made. In the result and on the issue of whether the actions by the appellant were indeed steps in the proceedings, the reservation of the appellant was overlooked, and the following authorities were not observed.

**[9]** In *Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor* [2002] 2 MLJ 625, the dispute between the appellant and the first respondent centered upon an earthworks contract, which contained an arbitration clause. The appellant, who disputed the claim, then entered unconditional appearance and filed an application for stay. The rather wordy question posed to the Federal Court was 'whether the function to be served by an entry of appearance in one statute, ie

A the Rules of the High Court 1980 was the same as the function to be served by the words 'steps in the proceedings' in s 6 of the AA 1952'.

**[10]** The Federal Court per Mohtar Abdullah FCJ, delivering the judgment of the court, answered (a) that the entry of an appearance is a mandatory procedural step to be taken by an applicant in proceedings in the High Court, but it is a permitted, excluded or an exempted step in the proceedings that does not amount to a step in the proceedings within the meaning of s 6 of the AA 1952, and, (b) that the service of pleadings is a step in the proceedings within the meaning of s 6 of the AA 1952 and an election to proceed with the proceedings in the High Court that will bar an application for stay to refer the dispute to arbitration. But it was that which was further answered that is the more instructive. The Federal Court answered that if the action taken is neither (a) or (b) above, then the court will need to consider whether such action amounts to a step in the proceedings by determining the nature of the action and whether or not it indicates an unequivocal intention to proceed with the suit and to abandon the right to refer the dispute to arbitration, which in effect was a long overdue endorsement of *Cheah Wai Poh v Chin Brothers & Co Ltd* [1958] 1 MLJ 215, where Syed Sheh Barakbah J, as he then was, held that the act must display an intention to proceed with the suit and to give up the right to have the matter disposed of by arbitration.

**[11]** In *Patel v Patel* [1999] 3 WLR 322, the plaintiff was granted judgment in default of defence. The defendant applied for an order that the judgment be set aside and that he be given leave to file a defence and counterclaim, and for subsequent directions. On a subsequent application, the defendant applied for the action to be stayed on the ground that it concerned a matter which the parties had agreed to refer to arbitration. The judge held that the defendant, by applying for leave to defend and counterclaim and for subsequent directions, had taken a step in the action to answer the substantive claim and was therefore barred from seeking a stay by s 9(3) of the English Arbitration Act 1996, which reads as follows:

> (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter …
>
> (3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.

> On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed …

**[12]** On whether the subsequent application by the defendant was before or after he had 'taken any steps in the proceedings to answer the substantive claim, the English Court of Appeal held that an otiose request — the application for leave to defend and counterclaim, and for subsequent directions, which the defendant need not ask once the default judgment was set aside — did not affect the right of the defendant to a stay of proceedings under s 9. The English Court of Appeal further held that given that the defendant had specifically stated in his affidavit that he intended to seek a stay, he was not estopped either by representation or conduct from asserting his right to invoke arbitration, even if his request for leave to defend and counterclaim had been a step in the proceedings.

**[13]** In *Capital Trust Investments Ltd v Radio Design TJ AB and others* [2002] EWCA Civ 135 (Transcript: Smith Bernal), which followed *Patel v Patel*, the facts were these. Radio Design issued an application for a stay on 6 December 1999. On 22 February 2000 the application was amended to refer expressly to s 9 of the 1996 Act and to make the assertion that Radio Design had filed an acknowledgment of service but that it had 'not taken any step in the action (such as filing a defence) to answer the substantial claim'. Both parties served evidence including evidence of Swedish law. Before the application was heard by the master, on 2 May 2000, Radio Design issued a further application in which it recited the fact that an application for a stay had been made and continued: 'In the event that its application for a stay is unsuccessful, the first defendant (ie Radio Design) applies for summary judgment against the Claimant …' The ground was that under Swedish law the claim had no real prospect of succeeding because under Swedish law a company is not liable for misrepresentations made on its behalf in connection with an issue of shares. The English Court of Appeal held that that application was not a step in the proceedings, as it did not express the willingness of Radio Design to go along with the determination of the courts instead of arbitration, and that the application was advanced 'in the event that its application for a stay is unsuccessful' which made it clear that it was specifically seeking a stay with the result that a step which would otherwise be a step in the proceedings, namely an application for summary judgment, is not so treated. In short, the English Court of Appeal held that Radio Design had at no stage indicated willingness that the courts should determine the claims instead of arbitrators, but to the contrary had asserted throughout that the action should be stayed under s 9(4) of the 1996 Act.

**[14]** Our s 10 is differently worded. But the principles are the same. Whether

an action amounts to a step in the proceedings is determined by the nature of the action and whether it indicates an unequivocal intention to proceed with the suit and to abandon the right to refer the dispute to arbitration. An application is not a step in the proceedings, if it does not express the willingness of the defendant to go along with the determination of the courts instead of arbitration. A defendant who has specifically stated in the application or supporting affidavit that he intends to seek a stay is not estopped from asserting his right to invoke arbitration. An application, which is made in the event that the specific application for a stay is unsuccessful, is not a step in the proceedings.

**[15]** The action of the appellant only gave away the following intention. Prayer (a) of encl 41, for an order to set aside the writ on the ground that German and not local courts had jurisdiction, clearly evinced that the appellant was not prepared to proceed with the suit. Prayer (b) of encl 41, for an order 'that the 1st Defendant be permitted 21 days from the date of an order herein to file the defence in the event this Honourable Court dismisses the application herein subject to the 1st Defendant having the liberty to apply to this Honourable Court for such orders as it considers appropriate and or necessary', applied for time to file a statement of defence. But that was not a prayer simpliciter, for time to file a statement of defence, without qualification. That prayer was made on the stated basis that it was only made if prayer (a) were dismissed and if the appellant had the liberty to apply for such orders as it deemed 'appropriate and or necessary'. Prayer (b) itself did not state what orders that the appellant would consider 'appropriate and or necessary'. But that should not be a mystery. In the affidavit filed in support of encl 41, the appellant openly reserved the right to refer the dispute to arbitration. Indeed, in all papers filed, the appellant unceasingly challenged the jurisdiction of the court below and reserved the right to refer the dispute to arbitration. The appellant indicated only that it was against the dispute being tried by the court below. Given the qualifications under which it was made, the prayer for time to file a statement of defence was only a precautionary step to obviate the risk of a judgment in default of pleadings, should prayer (a) be refused. It was not the same as in *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474, where documents were filed without objection to the recourse to court, or in *Thamesa Designs Sdn Bhd & Ors v Kuching Hotels Sdn Bhd* [1993] 3 MLJ 25), where the parties never questioned the jurisdiction of the court. Here, encl 41 never expressed the willingness of the appellant to go along with the determination by the courts and to abandon arbitration.

**[16]** Enclosure 41 was not a step in the proceedings. The fact that other defendants applied but failed to set aside the writ could not be held against the appellant (see 8ART). There was a valid and binding arbitration agreement

between the appellant and respondent, and the fact that the respondents had other defendants should not impact on the right of the appellant to refer the dispute to arbitration.

**[17]** For the above reasons, we unanimously allow this appeal with costs, and order a stay of the proceedings against the appellant pending arbitration.

*Appeal allowed with costs.*

Reported by Ashgar Ali Ali Mohamed